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**United States Postal Service and Larry Thurman Pretlow II.** Case 05–CA–180590

March 15, 2018

**DECISION AND ORDER REMANDING**

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE  
AND MCFERRAN

On August 1, 2017, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge’s ruling, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by first discriminatorily issuing to Charging Party Larry Thurman Pretlow II a probationary performance evaluation on June 8, 2016, and then by discharging Pretlow on June 9, 2016. The General Counsel’s theory of the case connects these allegations, contending that the Respondent unlawfully terminated Pretlow because of his reaction to and during the discriminatorily-issued performance evaluation. The General Counsel’s theory thus invokes the principle that “misconduct provoked by an employer’s unfair labor practice is not grounds for discharge” because employers should not be “permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline.” *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003).

The judge dismissed the complaint in its entirety, but in so doing made no reference to the complaint allegation concerning the issuance of the performance evaluation. Rather, he addressed only the discharge issue, finding that Pretlow’s protected activity<sup>2</sup> was a motivating factor in the Respondent’s decision to discharge him but that he

would have been discharged even in the absence of his protected activity because he failed to cooperate during the presentation of his performance evaluation. By failing to address the complaint’s discriminatory performance evaluation allegation and analyzing the discharge allegation without considering its connection to that unaddressed allegation, the judge failed to duly consider the General Counsel’s theory of the case.

In view of the absence of findings of fact or conclusions of law regarding the allegation that the Respondent discriminatorily issued Pretlow a performance evaluation, and the judge’s failure to consider whether the conduct for which Pretlow was discharged was unlawfully provoked by the discriminatory issuance of the performance evaluation—or indeed whether the conduct would have even taken place had there been no allegedly discriminatory performance evaluation—we find it necessary to remand the case to the judge for further findings and analysis.<sup>3</sup> On remand, the judge should consider, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), whether Pretlow’s protected activity was a motivating factor in the Respondent’s decision to give him the performance evaluation and, if so, whether the Respondent would have given Pretlow the performance evaluation even absent his protected activity. In considering this complaint allegation the judge should make specific credibility findings.<sup>4</sup> Further, in view of the General Counsel’s theory of the case, the judge should also reconsider Pretlow’s discharge in light of his findings and conclusions regarding the performance evaluation allegation.

**ORDER**

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Arthur J. Amchan for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of

<sup>1</sup> Prior to filing exceptions, the General Counsel filed a Motion to Rescind Order Transferring Proceeding to the National Labor Relations Board. By unpublished order dated November 6, 2017, the Board denied the General Counsel’s motion.

<sup>2</sup> The undisputed facts show that the Respondent previously discharged Pretlow, and that Pretlow was reinstated after the Union successfully arbitrated his discharge.

<sup>3</sup> See generally *R-W Service System, Inc.*, 238 NLRB 1016, 1016 (1978) (proceeding remanded to judge, where decision did not contain “findings and conclusions, with supporting reasons, on all material factual, legal, and discretionary issues involved in the case”).

<sup>4</sup> In particular, the judge should make a specific credibility finding concerning the testimony of the Respondent’s manager, Shakeel Khan, who testified that the Respondent gave Pretlow a performance evaluation—but not three other probationary employees—because Khan had only recently learned that a performance evaluation was required for probationary employees. Although noting Khan’s lack of specificity and the absence of corroborating testimony on this point, the judge did not specifically state whether he found Khan’s testimony credible.

Section 102.46 of the Board's Rules and regulations shall be applicable.

Dated, Washington, D.C. March 15, 2018

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Marvin E. Kaplan, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Katrina Ksander, Esq.*, for the General Counsel.

*Mark Wilson, Esq.*, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, D.C. on May 31 and June 1, 2017. Larry Thurman Pretlow II, filed the charge on July 21, 2016. The General Counsel issued the complaint on March 21, 2017.

The General Counsel alleges that Respondent, the United States Postal Service, violated Section 8(a)(3) and (1) of the Act by terminating the employment of Charging Party Pretlow on June 9, 2016, because Pretlow filed a grievance about his prior termination in February 2015 on which he prevailed in arbitration.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

###### II. ALLEGED UNFAIR LABOR PRACTICES

Respondent, which has its headquarters in Washington, D.C., provides postal services throughout the United States, including from its Engleside Post Office in Alexandria, Virginia. The Board has jurisdiction over Respondent pursuant to Section 1209 of the Postal Reorganization Act. The National Association of Letter Carriers (NALC), which represented the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act.

The Postal Service hired Larry Pretlow in March 2013 as a city carrier assistant (CCA). He began working in the District of Columbia but was transferred to Alexandria, Virginia, a few months later. On February 21, 2015, the Postal Service converted Pretlow to full-time regular status. Five days later, on February 26, 2015, it terminated his employment. At the time

of Pretlow's termination Shakeel Khan was the manager of the Engleside Post Office in Alexandria. Khan was also the manager when Respondent fired Pretlow in 2016. Although Khan is not mentioned in the arbitration award discussed below, he played some role in Pretlow's 2015 termination (Tr. 105–106).<sup>1</sup>

Pretlow filed a grievance pursuant to the collective-bargaining agreement between the NALC and the Post Office. Tobie Braverman, an arbitrator, conducted a hearing of Pretlow's grievance on April 8, 2016. On April 22, 2016, Arbitrator Braverman issued an award ordering Pretlow's reinstatement. She also ordered that Pretlow would have to serve the remainder of the 90-day probationary period that is required for employees who are converted from CCA to regular status.

##### The Arbitration Award

According to the arbitration award, Pretlow's 2015 termination arose out of a dispute with Supervisor Shari Hearn on February 14, 2015.<sup>2</sup> Pretlow threatened to file an EEO charge. Then, according to Pretlow, Hearn threatened him by saying that her sons would take care of him. Pretlow called the Postal Inspection Service's National Law Enforcement Communications Center (NLECC) and alleged that Hearn had threatened his life. Hearn also reported their confrontation. A postal inspector credited Hearn's account. However, the Postal Service did not take disciplinary action against Pretlow as a result of his February 14 argument with Hearn. It fired him for falsely stating to the Inspection Service that his life was in danger on three occasions. This apparently referred to the three occasions on which Pretlow contacted the Inspection Service; February 14 or 15, [the day he came a regular carrier], February 21 and 23, 2015.

On February 27, 2015, the Postal Service terminated Pretlow for making false statements to the Inspection Service that his life was in danger.

Under the terms of the collective-bargaining agreement between NALC and the Postal Service, a regular carrier has a 90-day probationary period during which time that carrier is not permitted access to the grievance procedure. CCAs do have such access. The Arbitrator concluded that the Postal Service delayed disciplining Pretlow until he became a regular carrier to prevent him from having recourse to the grievance procedure. She also found that the Postal Service had failed to meet its burden of proving that Pretlow had made false statements, the offense for which he was terminated.

Arbitrator Braverman ordered the Postal Service to reinstate Pretlow with full backpay. She ordered that he would remain

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<sup>1</sup> Khan's testimony regarding his role in the 2015 termination is confusing (Tr. 105–106). He testified that he initiated the termination but also suggested that his role was somewhat ministerial.

<sup>2</sup> Hearn was deceased by the time of the arbitration hearing and Pretlow did not testify about the circumstances of his dispute with her in this proceeding. Thus, I rely on the arbitrator's award for background as to the events resulting in the 2015 termination. However, I do not rely on the arbitrator's decision to credit Hearn's account of the February 14 confrontation. Therefore, I find the admonishment to Pretlow in her decision about the unacceptability of refusing to obey or arguing with a supervisor's instructions is irrelevant except insofar as it affected the conduct of Manager Shakeel Khan in 2016.

in probationary status until he completed the remainder of his 90-day probationary period. She also admonished Pretlow for being insubordinate to Hearn on February 14 and urged him to be more cooperative with management upon his return to work.

#### Pretlow's Return to Work on May 4, 2016

Larry Pretlow returned to work at the Engleside Post Office on May 4, 2016. On his first day back at work he met Post Office Manager Shakeel Khan and Local Union President Andre Washington. Khan informed Pretlow that his performance would be evaluated since he was a probationary employee. Khan and Pretlow initialed a blank evaluation form (Postal Service form 1750).

On May 31, Pretlow took offense at some conduct by Khan. It is not exactly clear what transpired. However, Khan apparently felt that Pretlow could not finish his delivery route on time. According to Pretlow, Khan publically ridiculed him for needing extra time or help to finish his route. He complained in writing about this to the assistant postmaster on June 1 (Exh. R-4). Khan testified that he generally tried to avoid interaction with Pretlow because Pretlow blamed him for the 2015 termination and because he "knew the way he goes off."

#### June 8, 2016 Performance Evaluation

On the afternoon of June 8, after Pretlow had finished his route, he was approached by his immediate supervisor, Rebar Chergosky. She informed him that he was going to have his evaluation that afternoon. Chergosky and Pretlow went to a private office in the back of the Post Office where they were joined by Shakeel Khan and Chief Union Steward Dwayne Martin. Of the conflicting versions of what occurred I find that of Martin most credible since of all the witnesses he had the least at stake in the outcome of this proceeding.<sup>3</sup>

Chergosky started reading from the evaluation form, which had six categories in which the employee was to be rated either outstanding, satisfactory, unacceptable or not observed. Chergosky told Pretlow that his work quantity was unacceptable. Pretlow loudly objected. Shakeel Khan and Pretlow began to argue loudly. Martin testified that there was no screaming, no threatening, no finger pointing. However, Martin took Pretlow out of the room to calm him down.

After they returned, most likely after Chergosky told Pretlow his dependability was unacceptable, Pretlow loudly protested again.<sup>4</sup> Pretlow and Khan began to argue again. Martin testified that Pretlow did not scream, bang on doors (as Khan testified) or otherwise behave in a bizarre manner. Pretlow stated that "he could not take this." Then he left the room again (Tr. 145). Martin then suggested that the meeting be terminated (Tr. 147-148). The evaluation was not completed.

<sup>3</sup> Respondent suggests that I should not credit Martin because he was afraid of Pretlow. Pretlow had threatened to sue the Union, had alleged that Martin and Union President Washington were "in cohorts with management;" and complained to the Union that Martin had not satisfactorily done his job as steward. Pretlow filed a "CB" charge against the Union which apparently related to his June discharge and Martin's conduct (Tr. 81-83).

<sup>4</sup> Dependability is the third category on the form. Rebar gave Pretlow a satisfactory rating on the second category, work quality.

With respect to how the meeting ended, I find Khan's account more plausible than Pretlow's. In regard to credibility, I have considered the fact that the General Counsel did not call Pretlow as part of its direct case. Respondent called Pretlow as a witness as part of its case. Also, I do not regard Martin's testimony at transcript pages 83-84 to be inconsistent with Khan's at 145. I conclude that it is Pretlow's behavior that prevented the meeting from being concluded.

After the meeting ended, on June 8, Rebar Chergosky prepared a termination letter for Pretlow with input from Khan and Respondent's labor relations staff.<sup>5</sup> The letter (GC Exh. 4), states:

This is to advise you that your employment is being terminated during your probationary period, effective immediately. The reason for this action is your improper conduct. You were recently converted to a full-time, regular letter carrier position with a 90-day probationary period. On June 8, 2016, when Supervisor Rebar Chergosky began conducting your 30-day evaluation, you became disruptive and rude, raising and shaking your hands. Your union steward, Dwayne Martin, was present for the evaluation and asked for a few minutes to talk to you. Martin took you out of the room, and upon your return a few minutes later, your behavior became even worse. Your attitude was negative, and your body language was aggressive. When I began to discuss your attendance and dependability, you began waving your hands and speaking loudly. You were threatening, saying, "You're in trouble already! I know people in high places!" I had to end the evaluation due to your hostile and threatening behavior.

Based on your improper conduct, it has been determined that it would be best not to retain your employment as a letter carrier.

#### July 9 termination

Respondent pulled Pretlow's timecard before he arrived for work on July 9. He was told to report to the office in the back of the Post Office. Martin, Khan, Chergosky, and Henry Baer from Respondent's labor relations department were present. Chergosky tried to present the termination letter to Pretlow. He began screaming, crying, and rolling around on the floor. Ultimately, somebody called an ambulance and Pretlow was transported off the premises.

#### Analysis

The filing of a grievance is a right protected by the Act, *Yellow Transportation, Inc.*, 343 NLRB 43 (2004). It is thus a violation of Section 8(a)(1) to discriminate against an employee for filing a grievance or prevailing in an arbitration.

<sup>5</sup> Chergosky and Khan testified that Chergosky made the decision to terminate Pretlow. I am very skeptical that this is true except in the most technical sense. Chergosky had been a supervisor for only a couple of months. It is clear that she consulted with Khan and Baer in making the termination decision. Given Khan's intimate involvement with the events surrounding Pretlow's discharge, I infer that his opinion was determinative. I also do not credit Chergosky's testimony that she was considering terminating Pretlow for poor performance prior to the June 8 meeting. That testimony is completely self-serving and unsupported by any documentation.

To establish an 8(a)(1) or (3) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line*, 251 NLRB 1083 (1980). The General Counsel generally satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, animus against the activity and sufficient grounds for inferring discriminatory motive. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In this case the General Counsel has met his initial burden. Respondent knew that Larry Pretlow had filed a grievance and had prevailed. Animus and discriminatory motivation can be inferred from the timing of Pretlow's second discharge so soon after his return to work following the arbitrator's award. Thus, the question becomes whether Respondent met its burden of proving that it would have fired Pretlow on account of his conduct at the June 8 performance evaluation.

The General Counsel relies heavily on the proposition that the June 8 evaluation was a "set-up" arranged to allow Respondent to terminate Pretlow for filing a grievance and prevailing. In support of this argument, the General Counsel notes that three other letter carriers were converted from city carrier to regular carrier and none of these had a performance evaluation during their probationary period (Tr. 136-137).

The Postal Service's response is that Shakeel Khan was not aware that he was supposed to do such an evaluation until a managers' meeting (GC Exh. 8, Tr. 136-137). Khan could not recall precisely when this meeting took place (Tr. 137-138).<sup>6</sup> The General Counsel argues, somewhat persuasively, that Respondent "failed to specifically articulate the circumstances resulting in Mr. Khan's education about the evaluation requirement" (GC Br. at 16). Given evidence that no other probationary regular carrier was given an evaluation prior to Pretlow, this is something on which one (Tr. 136). Respondent could certainly have proffered testimony from other managers to corroborate Khan's testimony. Such testimony would cer-

tainly have gone a long way to indicating that the June 8 evaluation was not discriminatorily motivated.

The General Counsel also argues that the discriminatory motive is suggested by the fact that the evaluation was conducted in a backroom office at the Post Office. Respondent argues that this was so because of Pretlow's hypersensitivity to criticism. This hypersensitivity, according to Respondent, was exhibited by Pretlow with regard to Khan's assignment of other carriers to assist Pretlow on his route on May 31.

Despite the suspicious background to the June 8 evaluation, there is no question that Pretlow did not cooperate in the evaluation and did not allow Respondent to complete it. I would also note that on May 4, when Khan informed Pretlow that this evaluation would take place, he did not object or assert that Respondent was discriminating against him in performing an evaluation during his probationary period. Moreover, there is nothing in this record that would lead one to conclude that Respondent's managers should have anticipated Pretlow's outburst in reaction to his performance evaluation.

The General Counsel argues that Respondent cannot rely on Pretlow's behavior on June 8, because it provoked his reaction. I disagree. There is no evidence on which I can base a conclusion that Respondent's adverse assessment of Pretlow's work quantity and dependability was discriminatorily motivated. He was not privileged to refuse to cooperate in the evaluation and prevent its completion. Therefore, I conclude that Respondent met its burden of establishing its affirmative defense (that it would have fired Pretlow for his conduct on June 8 absent his protected activity) and did not violate the Act in terminating his employment on the basis on his behavior at the evaluation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 1, 2017

<sup>6</sup> His testimony is that the meeting occurred a few months prior to June 2016.

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.